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IN THE

Supreme Court of the United States

October Term 1956

No. 909

ADOLPHUS HOHENSEE, an individual
EL RANCHO ADOLPHUS PRODUCTS, INC., a corporation
SCIENTIFIC LIVING, INC., a corporation
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND REASONS RELIED ON

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Adolphus Hohensee an individual, El Rancho Adolphus Products, Inc., a corporation, and Scientific Living, Inc., a corporation, respectfully petition this Honorable Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit which affirmed a judgment of the United States District Court for the Middle District of Pennsylvania convicting petitioners of violation of the Federal Food, Drug and Cosmetic Act.

I. OPINIONS BELOW

The opinion of the Court below affirming the judgment of conviction and sentence is not yet reported in the Federal Reporter. A copy thereof, together with a copy of the opinion denying petition for rehearing, appears in the Appendix hereto. The opinion of the United States District Court for the Middle District of Pennsylvania denying defendants' motions in arrest of judgment and for a new trial, appears in 140 Fed. Supp. 645 and is reproduced in the Record herein at page 41 et seq. of appellants' Appendix in the court below.

II. JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed, was entered January 29, 1957. Petition for rehearing was denied March 1, 1957. By order entered the 22nd day of March 1957, this Court extended the time in which to file petition for writ of certiorari to and including April 15, 1957.

Jurisdiction of the Court is invoked under the provisions of the Act of June 25, 1948, 62 Stat. 928 (28 USC 1254).

III. QUESTIONS PRESENTED

1. Is Section 502 (f) (1) of the Federal Food, Drug and Cosmetic Act of 1938 (52 Stat. 1050, as amended; (21 USC 352 (f) (1)) as applied here, constitutionally invalid as being repugnant to the First and Fifth Amendments to the Constitution or was said Section erroneously construed and enlarged by the Courts below in this case?

2. Did the United States District Court for the Middle District of Pennsylvania lack jurisdiction over the subject matter, contrary to the Sixth Amendment of the Constitution, in a case where food products, standing alone, were neither drugs, nor misbranded at the time

and place of introduction into interstate commerce as alleged in the indictment, but on the theory of the prosecution as adopted by the courts below, became misbranded drugs at that time and place, because, after being removed from interstate commerce and held for local sale by vendors other than defendants, in another district, the individual defendant orally mentioned such products during the course of lectures on nutritional science and health to a private audience at the latter point?

3. Was the verdict contrary to law, was there a lack of substantial evidence to support it, and a variance between allegations and proof?

4. Was the indictment invalid in the first instance, by reason of prejudicial allegations of a prior conviction of the individual defendant contained therein, and later during the course of the trial by being altered and modified by the Court, sua sponte, by blocking out the offending portions in the original, with a copy thereof as altered being submitted to the jury—which document was clearly not the presentment or indictment of the Grand Jury within the meaning of Article VI of the Amendments to the Constitution?

5. Did the prosecution's failure to allege and prove criminal intent, and the Court's instruction that such allegations and proof is not necessary, constitute an error of law?

6. Is the trial of a criminal case repugnant to the due process of law clause of the Fifth Amendment, in a case where:

(a) The trial court expresses criticism of the individual defendant's character, based upon statements made by the prosecution concerning matters not before the court; expresses concern over the meaning and application of the statutory language involved, but still permits the case to go to the jury; refers to the expense

to the Government, in denying defendants' motion for acquittal; does not grant defendants' several motions for a mistrial, based upon the alleged misconduct of the prosecutor; does not forcefully prevent the continued use of leading questions in the prosecution's examination of its witnesses and in other respects does not act to prevent the creation by the prosecution of an atmosphere of bias against the defendants;

(b) Where the prosecution made derogatory and inflammatory remarks and insinuations to the jury against the character of the individual defendant, not based upon evidence; continuously sought to impress upon the Court the prosecution's opinions that the individual defendant was a person of bad character and that the prosecution was aimed at putting him out of business because of activities which the prosecution did not approve of, but for which he was not on trial; in continued use of leading questions in the examination of its witnesses; in continuously seeking to create the impression that the prosecution had extraordinary powers over the conduct of the proceedings; and in other respects creating an atmosphere of bias.

(c) Where it was humanly impossible for the jury to have considered all of the voluminous printed evidence not previously read to them, in the short time they deliberated.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The portions of the First, Fifth and Sixth Amendments to the Constitution of the United States applicable here are as follows:

"ARTICLE I. Congress shall make no law—abridging the freedom of speech or of the press."

"ARTICLE V. No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury—nor be deprived of life, liberty or property without due process of law."

"ARTICLE VI. In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed—".

2. The pertinent provisions of the statute involved are contained in Sections 201 (f), (g), and (m); 301 (a); 303 (a); 502 (f) (1) of the Federal Food, Drug and Cosmetic Act of 1938 as amended; 52 Stat. 1041, 1042, 1043, 1050, codified as Sections 321 (f), (g), and (m); 331 (a); 333 (f) (1) in Title 21 United States Code respectively, and same are reproduced as follows:*

"Section 321. Definitions; generally for the purposes of this chapter—

• • • • •

"(f) The term 'food' means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

"(g) The term 'drug' means (1) articles recognized in the official United States Pharmacopoeia, official Homeopeia Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause

* Since the indictment and opinions of the courts below used only the United States Code reference, that practice will be followed hereinafter.

(1), (2), or (3); but does not include devices or their components, parts, or accessories."

• • • • •

"(m) The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article".

• • • • •

"Section 331. Prohibited acts

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

• • • • •

"Section 333. Penalties—Violation of section 331.

(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine or not more than $10,000, or both such imprisonment and fine."

• • • • •

"Section 352. Misbranded drugs and devices.

A drug or device shall be deemed to be misbranded—

• • • • •

"(f) Unless its labeling bears (1) adequate directions for use and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health or against unsafe dosage

or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users." • • •

3. The pertinent portions of the companion legislation in the form of the Amendment of March 21, 1938 (C. 49 Sec. 4, 52 Stat. 114) to the Federal Trade Commission Act of September 26, 1914, Title 15 USC Sec. 52, 55 is as follows:

"52 (a). It shall be unlawful for any person to disseminate, or cause to be disseminated, any false advertisement—

• • • • •

(2) By any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices or cosmetics."

"55. Additional definitions:

• • • • •

(a) (1) The term 'false advertisment' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or any combination thereof • • •"

V. STATEMENT OF THE CASE

A single indictment containing nine counts charging defendants El Rancho Adolphus Products, Inc., a corporation, Scientific Living, Inc., a corporation, and Adolphus Hohensee, an individual, with violation of the Federal Food, Drug and Cosmetic Act, (21 USC 331 and 333) was returned in the United States District Court for the Middle District of Pennsylvania on August 2,

1954 (Aplt. App. pp. 4, et seq.)*. The specific offense charged in each count was that defendants had caused to be introduced and delivered for introduction in interstate commerce at Scranton, Pennsylvania, during a specified period of time, certain food and herb products which were alleged to be misbranded as drugs because their labeling failed to bear adequate directions for use, within the meaning of 21 U. S. Code 352 (f) (1).

The first three counts pertained to shipments consigned to a storekeeper at Phoenix, Arizona. The next six counts pertained to shipments consigned to a storekeeper at Denver, Colorado. Counts VIII and IX were subsequently dismissed. No charge of fraud or adulteration was made, and it was later conceded that the prosecution knew of no complaints of harm or injury to any individual (App. p. 85). In the concluding paragraph of each count, it was alleged that Adolphus Hohensee, one of the defendants, had previously been convicted of violation of the Federal Food, Drug and Cosmetics Act (App. p. 51). An attorney in the Food and Drug Administration of the Department of Health, Education and Welfare participated in the trial as one of counsel for the United States (App. p. 58).

Defendants filed motions to dismiss the indictment, which were denied (App. pp. 18, et seq.), and motions for bill of particulars (App. pp. 16, 17) which were not acted upon by the Court, although certain dates and names of places were supplied verbally by the prosecution, with a statement that oral statements made by the defendant Adolphus Hohensee in lectures at those times and places, would be relied upon (App. p. 55). A mo-

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* In hereafter referring to the record, references (App. p.——) are to Appellants' printed appendix; (Govt. App. p.——(b)) to the Appellee's printed appendix, both of which have been certified from the Court below; and (Tr. .——) is to the official typewritten Transcript of record below.

tion for severance and for a separate trial on behalf of El Rancho Adolphus Products, Inc., was made and denied (App. p. 20). At the arraignment of defendants, pleas of not guilty were entered by all defendants. The arraignment and other preliminary proceedings took place in the presence of the petit jury panel (App. pp. 54, 56). Upon the case being called for trial, defendants filed a supplemental motion to dismiss on constitutional grounds (App. p. 23). At a conference in chambers, at which the individual defendant Adolphus Hohensee was not present, the defendants were granted sixteen peremptory challenges, and the United States was granted nine peremptory challenges (App. p. 57).

At the trial, the United States offered the testimony of a storekeeper from Phoenix, Arizona (Govt. App. pp. 1 (b) et seq.) and the testimony of a storekeeper from Denver, Colorado (Govt. App. pp. 79 (b) et seq; Tr. pp. 482, et seq.). A Food and Drug Administration inspector identified samples of El Rancho Adolphus brand peppermint tea leaves; Adolphus wheat germ oil; and El Rancho Adolphus brand herb laxative, obtained from the storekeeper at Phoenix, Arizona (App. p. 75). This witness had also attended a series of lectures given by the defendant Adolphus Hohensee between February 11, and March 6, 1952, at Phoenix, Arizona, and testified as to his recollection of what he heard there. Another Food and Drug Administration inspector identified samples of El Rancho Adolphus brand concentrated broth, El Rancho Adolphus brand whole wheat, El Rancho Adolphus brand peppermint tea leaves and El Rancho Adolphus brand wheat hearts, obtained from the storekeeper at Denver, Colorado (Tr. pp. 209, et seq.). A stenographer-clerk employed by the Food and Drug Administration attended a series of lectures given by defendant Adolphus Hohensee at Denver, Colorado, between July 29, and September 3, 1952, and testified as to her recollection of what she heard there (Tr. p. 533, et seq.).

It was conceded by the prosecution that for proof of the allegations of the indictment, the prosecution relied upon the oral statements made by defendant Adolphus Hohensee at the aforesaid lectures in Phoenix, Arizona, and Denver, Colorado, respectively (Tr. pp. 170, 171, 174; App. p. 88). Defendants timely objected to the irrelevancy and immateriality of the evidence of such oral statements (App. p. 138; Tr. pp. 163, 541a).

A former employee of defendant Scientific Living, Inc., testified as to what he did at Denver, Colorado during the months of August and September 1952 (Tr. pp. 367, et seq.). A person who attended the Denver lectures also testified (Tr. p. 727). Representatives of transportation companies identified copies of shipping documents (Tr. pp. 120, et seq.; 518, et seq.). Seventy-three Government exhibits were received in evidence consisting of samples of the goods, shipping documents, order and invoice sheets, checks, bank and corporate records, and including twenty-four booklets and pamphlets used in connection with the Hohensee courses on food and health. Defendants moved to suppress evidence, to return goods seized and to strike the testimony and exhibits relating to the samples taken by the Food and Drug Administration inspectors, which motion was denied as to Counts I through VII, inclusive (App. p. 24). The prosecution announced that Counts VIII and IX were nolle prossed (App. 146). At the close of the prosecution's evidence, defendants moved to dismiss and for judgment of acquittal. The motion was denied verbally with a reservation (Tr. p. 825).

Defendants called as witnesses five individuals who had attended the series of lectures at Phoenix, Arizona, and Denver, Colorado, respectively, and offered in evidence those portions of certain pamphlets identified by Government witnesses which had not been included in the Government's offer into the evidence. Fifty-five of defendants' exhibits were admitted into evidence, consist-

ing of charts, books and pamphlets used in connection with the Hohensee courses on Food and Health including the entire volume from which the prosecution had introduced extracts in evidence. No rebuttal being offered by the prosecution, defendants moved for judgment of acquittal, which was denied (App. p. 27). Requests for instructions were filed by both parties (App. p. 30 et seq.), and exceptions were taken by defendants to the Court's refusal to charge as requested by defendants (App. 171). Defendants were instructed to proceed with an opening summation to the jury (Tr. p. 1117), and the prosecution followed. (Govt. App. pp. 137 (b) et seq. 1).[1] Defendants excepted to a portion of the Court's charges (App. p. 1194). The Court, sua sponte, over the objection of defendants (Tr. pp. 115, 1194) submitted a modified copy of the indictment to the jury (Tr. pp. 114, 1191, 1193). The jury retired to deliberate at 11:30 A. M., January 6, 1955 (See Documentary Record: Clerk's minute sheet for January 6, 1955, and orders directing Marshal to pay hotel bill for jury's lunch), returning at 3:00 o'clock P. M., January 6, 1955, with a verdict of guilty as to all defendants on each of the seven remaining counts of the indictment. It was stipulated by defendant Adolphus Hohensee that he was the person named in the original of the indictment as having been previously convicted of a violation of the Federal Food, Drug and Cosmetic Act (Docket entry of January 6, 1955, App. p.

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[1] The offending portions are also reproduced in appellants' appendix pages 172-174. The Chief Judge of the Court below at oral argument commented on an example as follows: "If the assistant District Attorney wants to be eloquent, and instead of sticking to the law where he has a good case, or thinks he has a good case, he proceeds to make some parallel which is really farfetched and not really worthwhile. It seems to be it's a wrong or undesirable trial. . . . I think a degree of dignity is required from the United States in conducting a trial which is a very high degree. And I don't believe, speaking for myself, that this should be used in a case." Transcript of oral argument pp. 62, 65.

2). The previous conviction was for a different type of offense under the same Act (App. p. 86). Motions in arrest of judgment and for a new trial were filed by all defendants on January 7, 1955 (App. p. 36). With leave of Court, additional reasons in support of the motion for a new trial were filed June 3, 1955 (App. p. 38). Defendants' motion for leave to present evidence in support of their motion for a new trial, was denied on June 24, 1955 (App. p. 40). The Court's opinion and order denying defendants' motion in arrest of judgment and for a new trial, was entered April 18, 1956 (App. pp. 41, et seq.; 51).[2]

The following concessions and admissions were either directly or impliedly made by the prosecution at the trial:

1. The prosecution was aimed at driving the defendant Hohensee out of business and to prevent and punish him for espousing to his classes, by means of private lectures and text books and pamphlets, the naturapathic doctrine of maintaining and preserving health and correcting bad dietary habits by natural methods, free of drugs. (App. pp. 105, 106)

2. The prosecution, as proof of the misbranding charges, relied principally if not entirely, on evidence of oral statements made by defendant Hohensee from the lecture platform. (App. p. 55)

3. The prosecution conceded that the goods in question, standing alone, were not misbranded at the alleged times of introduction into interstate commerce and that nothing was said about any products and none of the printed material offered as evidence was distributed to a private audience until sometime after those times, but that the goods in question, became misbranded for failure to bear in the labeling, adequate directions

[2] The opinion appears in 140 F. Supp. 645.

for use for the conditions of the body about which defendant Hohensee lectured, because a scheme existed in his mind,—such contention being attributed to the fact that Hohensee or his representatives, took orders from and sold quantities of the Adolphus Brand food products to local store-keeper prior to the shipments, obtained the assistance of the storeokeeper in publicizing the forthcoming lecture series through advertisements in the local press, and by means of leaflets announcing the medical subjects to be discussed at the time and place named therein, without any mention of the Adolphus Brand products. (App. 174)

4. The prosecution conceded that they were not relying on any interpretive regulation of the Agency sponsoring the prosecution and none was pleaded, shown to exist or directly referred to in the trial court. (App. p. 83)[3]

5. The prosecution conceded that they knew of no case where anyone was harmed or injured by Hohensee's teachings. (App. p. 85)

On May 25, 1956, defendant Hohensee was sentenced to be imprisoned for one year and one day on each of the seven counts remaining in the indictment, the sentence to run concurrently. Defendant Scientific Living, Inc., was sentenced to pay a fine of $100 on each of the

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[3] However, the case of *Colgrove* v. *United States* 176 F 2d 614 was referred to during argument in chambers, as holding such a regulation quoted therein as 21 CFR 2.106, to be authoritative. But for the first time the United States reproduced in its brief before the Court below, excerpts from a regulation described as 21 CFR 1.106, which differed substantially from the section quoted in *Colgrove*. The Court below in its opinion reproduced verbatim the excerpts appearing in appellee's brief. It was to be noted that this latter section was first published in 17 F. R. 6816 on July 25, 1952, after the time of the offense as alleged in Counts I, II and III of the indictment—the word "oral" being coupled with "written, printed or graphic" advertising.

seven remaining counts, or a total of $700. Defendant El Rancho Adolphus Products, Inc., was sentenced to pay a fine of $100 on each of the seven remaining counts of the indictment, or a total of $700 (Docket entries of May 25, 1956; App. p. 4)

On appeal by each of the defendants to the United States Court of Appeals for the Third Circuit, the appeals were consolidated by order of that Court. Under date of January 29, 1957 said Court affirmed the judgment and under date of March 1, 1957 denied appellants' motion for rehearing. Under date of March 22, 1957 this Honorable Court extended the time in which to file this petition to and including April 15, 1957.

VI. REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The United States Court of Appeals for the Third Circuit has decided an important question of Federal law which has not been, but should be, settled by this Honorable Court; has decided a Federal question in a way in conflict with applicable decisions of this Court; and has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court, as to call for an exercise of this Court's power of supervision, in the following respects:

1. Constitutionality

(a) The Court below in deciding the constitutional and statutory construction questions raised, disposed of the issue in favor of constitutionality of 21 USC 352 (f) (1) on the basis of *Kordel* v. *United States*, 335 U. S. 345 (1948), with the observation that in that case this Honorable Court upheld a conviction where the circumstances were very close to the case at Bar. In reaching this conclusion, the Court below referred only

to one of the appellants' contentions, namely, that the statutory language ("bears adequate directions for use") with reference to drug misbranding, is too vague, indefinite and uncertain, as construed, to proscribe their activities.

In relying on *Kordel* v. *United States* (supra) the lower Court erred in its application of the law and the facts of that case, to the instant situation, in that *Kordel* dealt with an entirely different part of (21 USC 352 (a)) of the Federal Food, Drug and Cosmetic Act, namely, misleading labeling; did not deal with the question as to whether a food product can be converted into a drug by oral statements made from the lecture platform to a private group; did not interpret the meaning of the statutory language "unless its labeling bears adequate directions for use", but went off on the interpretation of 21 USC 301 (m) (2) to the effect that the words in written, printed or graphic matter accompany said article so as to become part of its labeling and thus to cause the article to be misbranded within the meaning of 21 USC 352 (a) for false or misleading labeling, even though such material did not physically accompany the product in point of time and route, so long as it supplements or explains another article or thing,—the fact being that the offending circulars or pamphlets furnished by the distributor to retail vendors of such distributed products were subsequently distributed by the vendors to their customers and to the public.

Where a drug is involved, the key words of Section 352 (f) (1) are "adequate" and "use"—both of which have a usual, ordinary and normal meaning to a reasonable mind when standing alone and not qualified or modified by some hidden or obscure meaning. "Adequate"[4] means "sufficient" (for any purpose); "equal to some requirement."

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[4] There is no definition or standard mentioned in the Act as to what is meant by "adequate" as applied to "directions for use".

"Use" as a word of action means "employ, avail oneself of, make use of" in the sense of taking or applying—i.e., "to use." When the words are taken in context with the next succeeding phrase of the section "and such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health or against unsafe dosage or methods of duration . . ."—it is clear that what is meant to be conveyed to manufactures and distributors of drugs in interstate commerce, is the admonition that on the labeling on their products, or anything written, printed or graphic which accompanies them (as defined by Sec. 321 (m)), there must be advice or an explanation, or statement (direction), as to *how* the product is to be taken or applied, or used (i.e., orally, externally, etc.), together with the quantity and periods of taking or using (adequacy), plus any necessary warning against over-use if there are elements of danger present in the taking or using.

To reason otherwise, would do violence to common sense and leave the language so vague, indefinite and uncertain as to create constitutional infirmities. In the instant case, the prosecution in effect theorized that anything taken into the human system except for the limited purpose of appeasing hunger or quenching thirst, automatically becomes a drug, even though it is a food or food supplement or a beverage. The prosecution then went further and contended that after the words "adequate directions for use" more words should be read into Section 352 (f) (1)—namely, "for the purposes recommended or suggested" by means of disputable inferences taken out of context, in the progress of a long series of oral discussions in a classroom about the relation of proper eating and drinking habits to the attainment and maintenance of good health. The Courts below accepted both this theory and contention as the law of the case. *Alberty Food Products* v. *United States,* 194 F. 2d 643, was principally relied on as authority for

expanding the "directions for use" language of the section (Tr. p. 168). There the situation was quite different. The injunction provisions of the statute (Sec. 332, Title 21 USC) were invoked—not the criminal section as here; specific *printed* statements were made in newspaper advertising directed to the public at large about the efficacy of a *drug* for a specific condition which caused the labeling to be misbranded for failure to bear adequate directions for use—not, as here, where general oral discussions about conditions and diseases took place as part of a health and food series of lectures to a private, non-public, and limited audience, where all manner of foods were discussed pro and con. In *Alberty,* supra, the defendant was in effect charged with and enjoined from violation of an administrative regulation which was before the court—while here there was no administrative regulation involved and none was relied upon by the prosecution (App. p. 83). Certainly regulations of the executive branch are not a source of reliance for enlargement of the statutory language of a criminal statute. Cf. *Federal Communications Commission* v. *American Broadcasting Co.,* 347 U. S. 284, 296, 297; *and United States* v. *Goldberg,* 225 F. 2d. 180, 185 and cases cited therein.

The Court below thus erred in so construing the statute to apply to the facts in the instant case, in which a felony punishment could be (and was) invoked against defendant Hohensee, and in holding that the indictment stated facts to constitute an offense against the United States (App. pp. 18, 19, 20, 22).

When a statute is so vague, indefinite and uncertain, and when there is no ascertainable test or standard of prohibition or guilt set up by which a person could ascertain whether or not his actions or his contemplated actions are violative thereof, or give fair warning as to what actions constitute a crime, the statute is unconstitutional. *United States* v. *Cardiff,* 344 U. S. 174;

United States v. *Five Gambling Devices,* 346 U. S. 441; *Connally* v. *General Construction Co.,* 269 U. S. 385; *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81; *United States* v. *Weitzel,* 246 U. S. 533; *McBoyle* v. *United States,* 283 U. S. 25; *Lanzetta* v. *New Jersey,* 306 U. S. 451. See also *Screws* v. *United States,* 325 U. S. 91, and *Winters* v. *New York,* 333 U. S. 507, 515 [5] wherein it was said:

> "Men of common intelligence cannot be required to guess at the meaning of enactment."

Criminal statutes, to avoid violation of the Fifth and Sixth Amendments, must be sufficiently definite to apprize the layman of ordinary intelligence who may be subjected thereto, whether such statutes apply, and if so, what things must be done to comply with their terms. As this Court said in *United States* v. *Harris,* 347 U. S. 612, 617: "The Constitutional requirements of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute". Also see: *United States* v. *Reece,* 92 U. S. 214; *United States* v. *Brewer,* 139 U. S. 278; *Cline* v. *Frank Dairy Co.,* 274 U. S. 445; *Smith* v. *Calhoun,* 283 U. S. 553.

See also *Williams* v. *United States,* 341 U. S. 97, 102, on the point that many criminal statutes might be extended so as to make their application unconstitutional and a close construction would often save an Act from vagueness that is fatal, citing *Screws* v. *United States,* (supra). While the majority upheld the conviction, *Wil-*

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[5] Mr. Justice Douglas in his book "We the Judges" (Doubleday & Co. 1955) on page 29, made the following comment: "These decisions (United States v. Cohen Grocery Co.; Screws v. United States; Winters v. New York) reflect the repulsive reaction against the practice of the ancient Roman Emperor Caligula who, we are told, 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it. Suetonius,' Lives of the Twelve Caesars, p. 280."

liams was a five to four decision. See also *Schooler* v. *United States,* 231 F. 2d 560, 564 (CCA 8th, 1956) re: the principle that ambiguity in criminal statutes is not to be resolved to embrace offenses not clearly within the law.

The opinion of the four dissenting justices in *Kordel* v. *United States,* (supra) points up one aspect of the problem—namely the re-writing of a section of a statute by judicial interpretation so as to broaden its coverage, where if any hiatus exists, Congress should fill it if it so desires.

Criminal statutes restricting First Amendment freedoms must comply with stricter requirements of definiteness than other criminal statutes. *Stromberg* v. *California,* 283 U. S. 359; *Thomas* v. *Collins,* 323 U. S. 516; concurring opinion of Mr. Justice Douglas in *United States* v. *Rumely,* 345 U. S. 41.

Of equal persuasiveness, even though often-times contrary to the views of his associate judges, are the forceful expressions of the late Judge Jerome Frank of the Second Circuit Court of Appeals, on the subject of Constitutional rights both under the First Amendment (*United States* v. *Roth,* 237 F. 2d. 796, 801; cert. granted, 1 L.ed. 2d. 319) and the necessity for the judiciary to insist that administrative officials exercise wide discretionary powers *only* in accordance with any statutory provisions which require that they commit themselves to properly published standards. *United States* v. *449 cases of Tomato Paste,* 212 F. 2d. 567, 579.

Judge Frank in *United States* v. *Roth* (supra) pointed out in his separate concurring opinion that, "when legislation *affects* free expression, the void-for-vagueness doctrine has a peculiar importance." (p. 803—emphasis supplied.) Judge Frank then went on to point out (p. 805) that even assuming that a statute aims at an

altogether desirable aim its desirability does not render it Constitutional (quoting from *Bailey* v. *Drexel Furniture Co.* 259 U. S. 20, 37).

(b) The Court below did not specifically refer to the petitioners' other contentions with respect to the application of the First Amendment to the Constitution and the enlargement of the statute by judicial or administrative interpretation, to the situation here, wherein by judicial interpretation, the language of the Section was expanded to cover utterances made from a lecture platform to a restricted group of persons who had enrolled in a course of lectures on the subject of Nutritional Science.

The question then arises as to whether other constitutional rights and privileges are infringed upon, when an Act is interpreted in such a manner as to make the utterance of the spoken word the commission of a crime, when the utterance per se is not malum prohibitum. Freedom to learn is the great aim of freedom of expression. It is indeed one of the great values in a free society. It was brought clearly to focus by *Meyer* v. *Nebraska,* 262 U. S. 390. Freedom of speech is now preferred in the American system against both state and federal action, and because the legislative branch is granted no powers to regulate it. See *Thomas* v. *Collins,* 323 U. S. 516. Cf. *Poulos* v. *New Hampshire,* 345 U. S. 395; *Edelman* v. *California,* 344 U. S. 357. Free discussions of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. *Pennekamp* v. *Florida,* 328 U. S. 331.

The same principle applies to the defendants' publications used in the classroom, for freedom of the press is part of the freedom of expression guaranteed by the Constitution. All media of communication deserve the protection of the First Amendment because of their high service in the communication of ideas, and a "require-

ment that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan* v. *Esquire,* 327 U. S. 146, 158.

Since defendant Hohensee's activities were in the nature of teachings on subjects closest to every human being past the bloom of youth, and (without the ritualistic aspects of cults or religious sects), embraced many phases of theology or religion, his utterances from the platform are likewise protected.

The First Amendment has a broad reach and includes the exotic forms of religion. Unorthodox beliefs and teachings are so protected. *United States* v. *Ballard,* 322 U. S. 78, 87. CF. *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94. The philosophy of the First Amendment guarantee is best illustrated by the following statement in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 641, 642:

> "We can have intellectual individualism and rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes . . . freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

Again in *United States* v. *International Union* — U. S. —; 1 L. ed. 2d. 563 (1957) Mr. Justice [redacted] Douglas, with whom the Chief Justice and Mr. Justice Black joined in the dissent, stated: (1 L. ed. 2d. 581) "When the exercise of First Amendment rights is tangled with conduct which government may regulate, we refuse to allow the First Amendment rights to be sacrificed merely because some evil may result. Our insistence is that the regulatory measure be 'narrowly drawn' to meet the evil that the government can control. *Cantwell* v. *Connecticut* 310 U. S. 296." See also concurring opinion of Justices Rutledge, Black, Douglas and Murphy in *United*

States v. *C. I. O.* 335 U. S. 106, 141, 142 and cases there cited on point that statutes restrictive of, or purporting to place limits to First Amendment freedoms must be narrowly drawn to meet the precise evil the legislation seeks to curb.

In a case such as this, the regulatory provisions of the Act invoked to create a criminal offense, must be strictly construed. *Alberty* v. *United States,* 159 F. 2d 278, 280; *United States* v. *Cardiff,* (supra). If a construction of an act is possible that will save it from being constitutionally infirm, then courts will adopt that construction, especially in considering a penal statute. In *United States* v. *Five Gambling Devices,* (supra), this Court stated:

> "Our policy in constitutional questions is reinforced by the long tradition and sound reasons which admonish against *enlargement of criminal statutes by interpretation.*" (Emphasis supplied)

"If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that to include it within the statute would be to legislate and not to construe legislation." *France* v. *United States,* 164 U. S. 676, 682, 683; cited with approval in *United States* v. *Halseth,* 342 U. S. 277, 280, wherein the Court also stated, "In the instant case, too, the statute is penal and must be strictly construed."

2. The Jurisdictional Question

(a) The Court below further erred in holding that this Honorable Court in *Kordel* rejected the argument that false advertising of foods, drugs, cosmetics or devices, as such, is exclusively under the jurisdiction of the Federal Trade Commission Act, in that this Honorable Court did not have before it a comparable situation as here, but did in effect distinguish between advertising that becomes part of the labeling of a drug because of the accom-

paniment rule, under the jurisdiction of the Federal Food, Drug and Cosmetic Act, and false and misleading advertising of foods, drugs, cosmetics and devices, including "oral" advertising which does not constitute labeling and which therefore comes within the jurisdiction of the Federal Trade Commission Act. It was petitioners' contention in this regard as urged before the Courts below, based upon the prosecution's tactics and the United States Attorney's announced intention of putting defendant Hohensee out of business (App. pp. 105, 106, Tr. p. 204)—that the prosecution was actually grounded on a disbelief in defendant Hohensee's recommendations as to how to maintain and preserve good health,[6] but because of the necessity of proving the falsity of such statements and recommendations, the prosecution by a circuitous and strained method, sought to bring such disbelief within the orbit of Section 352 (f) (1) of the Federal Food, Drugs and Cosmetic Act as a short-cut method of preventing and punishing for, the teaching of such principles—instead of proceeding under the Federal Trade Commission Act if, as contended, the oral statements from the lecture platform constituted "advertising" of the products and if the prosecution seriously believed that the falsity of such statements could be proven.[7]

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[6] Although no charge was made that the products were adulterated or misrepresented, and no proof to that effect was offered, yet the Court below, as did the trial court, appeared to be more impressed by what the Court below termed "astounding", "fantastic representations", even going so far as to refer to the products named in 4 counts of the indictment, as "the products alleged in those counts to have been *misrepresented*," than by the law of the case as to whether or not the food products on the dates stated in the indictment, became drugs, and as such, were misbranded because of omission from the labeling of a statement of the subjects later referred to in oral lectures given by defendant Hohensee on the subject of health and nutrition through the application of certain dietary principles.

[7] See statement made by Senator Wheeler, floor manager and co-sponsor of Senate Bill 1077, 75th Congress (which became the

It is further the contention of petitioners that the Court lacked jurisdiction, in that the venue of the offense, if any offense there was, was not in the middle district of Pennsylvania, but in the judicial district embracing Phoenix, Arizona, and Denver, Colorado. (Amendment VI Constitution). It was at each of these latter places, after the goods had arrived as the property of a local storekeeper, that any possible misbranding could have been brought about by the utterances of defendant Hohensee. If misbranded at all, it was not the goods caused "to be introduced and delivered for introduction into interstate commerce at Scranton, Pennsylvania" (Indictment, App. p. 4), which were then and there misbranded at the times alleged, but the goods on the shelves of the local storekeepers, when held for sale by them after the termination of their transit in interstate commerce.

The four dissenting Justices in *Kordel* v. *United States* (supra) felt that the majority's interpretation of the Act seemed to create a new offense to make it a crime to introduce drugs into interstate commerce if they should be subsequently misbranded—the dissenting Justices taking the position that they should not rewrite Section 301 (a) (21 USCA 331 (a)) (Prohibited Acts) so as to broaden its coverage and that if Congress left

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Federal Trade Commission Act of March 21, 1938), Vol. 83 Congressional Record, beginning at the bottom of page 3255 as follows: "The Federal Trade Commission has always had jurisdiction over false advertising of foods, drugs, devices and cosmetics . . . The new provisions of this bill dealing with those specific commodities do not confer upon the Commission jurisdiction which it does not now possess but are designed to make its control over such advertising more effective. Control over labeling and condemnation, through seizure proceedings, of these products remains where it has always rested, with the Food and Drug Administration of the Department of Agriculture. No jurisdiction is taken from that Department, *which has never exercised control over the false advertisement of foods and drugs.*" (emphasis supplied)

a hiatus, Congress should fill it if it so desires. The dissent pointed out the dangers in splitting one and the same transactions into many offenses, cited *Blockberger v. United States,* 284 U. S. 299, 304, 305. The dissenting opinion also pointed out that the Federal Food, Drug and Cosmetic Act created several offenses each of which separately depended upon the relationship the misbranded drug *then* bears to interstate commerce, it being noted that Section 301 (a) forbids the "introduction or delivery for introduction into interstate commerce of misbranded drugs";[8] Section 301 (b) forbids misbranding while the drugs are "in interstate commerce"; Section 301 (c) prohibits the "receipt" of such drugs in interstate commerce and Section 301 (k) forbids misbranding while drugs are "held for sale after shipment in interstate commerce."

3. The Evidence

The charges of the indictment were laid under Sections 301, 303 of the Federal Food, Drug and Cosmetics Act of 1938 as amended (21 USC 331, 333) covering the following points upon which a violation was asserted, namely:

1. The food products involved were alleged to be drugs.

2. They were alleged to be misbranded as drugs under Section 502 (f) (1) of the Act (21 USC 352 (f) (1) because their labeling failed to bear adequate directions for use for the purposes, conditions and diseases referred to in the indictment, as being intended.

The evidence adduced by the prosecution showed the products (with the possible exception of the Herb Laxative on the container of which appeared a label contain-

[8] The section under which the indictment is laid in the instant case.

ing directions for use as a laxative as well as a statutory warning against habit forming uses) to be food or beverages when used in the human diet as recommended and suggested in oral statements from the lecture platform to a restricted group of individuals interested in the subject of nutritional science.

That the Federal agency sponsoring the prosecution recognizes the distinction between dietary food used in the treatment of any disease resulting from a dietary deficiency in man, and "drugs" as defined in Secton 201 (g) of the Act (Title 21 USC 321 (g))—is exemplified by the Agency's Regulation appearing in 21 CFR part 125 Sec. 125.1 through 125.9 inclusive establishing requirements as to "label statements concerning dietary properties of food purporting to be or represented for specific dietary uses."—but defendants were not prosecuted under the food section of the enactment.

The evidence established that defendant Hohensee spoke to his class of students about the part played by food in human nutrition; that he recommended the use of certain food in the diet and the elimination of others from the diet; and gave instructions as to the use of such foods and beverages as a part of the diet; distributed printed diet instructions with respect to the inclusion of peppermint tea, broth, and the herb laxative when needed for that purpose; and generally instructed his classes on the theory of the use of natural drugless methods in overcoming and correcting diseases and other conditions of the human mind and body and how to preserve and maintain normal health. The prosecution failed to sustain the allegations of the indictment in two respects, namely: First, that the products named therein were drugs so as to bring their labeling within the orbit of the Drug Section of the Act (21 USC 321 (g) and 352) and second, failed to establish that at the time *of introduction into interstate commerce* as alleged in the in-

dictment these products were misbranded as drugs because of suggested uses in the diet of man for the purposes of overcoming conditions and diseases and for the maintenance and preservation of good health.

The evidence further established that the only literature distributed at the lectures, which contained a mention of any of the products named in the indictment, consisted of two pamphlets (Govt. Ex. 24, 66; Govt. App. pp. 40 (b) et seq.), containing recommendations for a dietary fast, in which appeared instructions for the use of Adolphus Brand peppermint tea as a beverage, and Adolphus Brand Broth for sustainence, and Adolphus Brand Natural Herb Laxative, as a laxative if the need arose during the fasting period. Thus persons receiving those instruction pamphlets at the lectures had adequate directions for use of the products named, for the purposes for which intended. Within the doctrine of *Kordel* v. *United States* (supra), these pamphlets could be said to accompany so as to be part of the labeling of any of such products acquired by any persons in the limited audience exposed to the recommendations with respect to intended uses. The Court below erred in concluding in effect that *Kordel* v. *United States* (supra) decided the problem as to whether food products concededly not misbranded per se at the time alleged in the indictment as having been introduced into interstate commerce—could have then and there become misbranded drugs because of oral statements made from the local lecture platform to a private audience at some subsequent time after the goods had been removed from interstate commerce for purely local sale and in effect, refusing to apply the accompaniment rule of *Kordel,* to the fact that the only written, printed or graphic matter distributed at such subsequent lectures mentioning the products, gave adequate directions as to how to use such products.

As to the variance between the evidence and the allegations of the indictment, the crux of the matter is, first, were the products which were clearly foods at the time alleged in the indictment—not foods but became drugs at that self-same time because something was said about them later in lectures on diseases and other conditions of the mind and body, and second, even though these food products could be brought within the definition of drugs in the statute, yet could they have become misbranded before the fact, i. e., before any references to suggested uses had been made by oral statements with respect thereto.[9]

Each count of the indictment alleged either "a number of cans containing a drug" or "a number of bottles containing a drug" or "a number of bags containing a drug"—as being misbranded on a certain date, because the labeling was inadequate through failure to state the intended uses later discussed in a private lecture. Since there was no public dissemination of that information, can it then be said that each single sample can, bottle or bag obtained locally out of the shipment named, was a misbranded item, even through the purchaser or taker (including the Food and Drug Inspector who obtained the Government Exhibits 43, 45, 47, 48 used in support of the last four counts of the indictment) had not attended the Hohensee lectures and was thus not exposed to the information claimed to be the cause of the labeling deficiency?

Only those individuals attending the lectures and who received the printed instructions, had any knowledge as to the suggested use of such products as part of a fast. If they subsequently purchased the products mentioned, the same situation obtains—namely, that the printed in-

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[9] There is reproduced in the Appendix (infra) a chart analysis used in the Courts below showing by record references, the variance between the proof and the allegations in this respect.

structions were actually a part of the labeling of the goods that might have been purchased by students from a health food store.

To *all* other members of the public who did not attend the lectures, the products were simply health foods, in the same category as any food on the shelves of any grocer.

The prosecution must always prove the criminal charge beyond a reasonable doubt and appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that in itself is only an approximation. Cf. *Holland* v. *United States*, 348 U. S. 124, 126, 129.

The jury rejected the clear, convincing evidence disproving the allegations of the indictment, and speculated upon whether the defendant Hohensee's talks and the pamphlets (none of which even remotely suggest any of the products for use in any disease or bodily ailment) were subjective or objective. Furthermore, the jury could not have rationally considered all of the evidence in reaching its conclusion, because in the two hours or less during which they deliberated it would have been impossible for them to have read and considered all of the book and pamphlet exihibits in evidence, only an infinitesimal part of which had been read to them during the trial. They thus disregarded the Court's instruction that they must consider *all* the evidence. The jury may not be permitted to conjecture merely or to conclude on speculation or from passion, prejudice, or sympathy. *Curley* v. *United States*, 160 F. 2d 229, cert. denied, 331 U. S. 837.

It is the well established rule of law that the burden of proving guilt beyond a reasonable doubt is upon the prosecution; that the evidence necessary to establish

guilt beyond a reasonable doubt, must be substantial, clear and convincing, and unless there is substantial evidence of facts which exclude every reasonable hypothesis but guilt, the defendant cannot be convicted. *Edwards* v. *United States,* 7 F. 2d 357; *Wright* v. *United States,* 237 F. 855. As to what constitutes substantial evidence, see *Universal Camera Corp.* v. *N. L. R. B.,* 340 U. S. 474; *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197; *N. L. R. B.* v. *Columbian Enameling and Stamping Co.,* 306 U. S. 292. If evidence is such that reasonable jurymen must necessarily have a reasonable doubt as to guilt, the judge must require acquittal. *Curley* v. *United States,* supra; Rule 29 (a), Fed. Rules Cr. Proc.; *United States* v. *Garvin,* 71 F. Supp. 545. It should also be noted that as to defendant El Rancho Adolphus Products, Inc., the testimony offered by the Government as to defendant Hohensee's connection therewith, related only to a period in 1953—subsequent to the time alleged in the indictment (App. p. 153).

4. The Indictment Question

The indictment contains, and the grand jury improperly considered, irrelevant and prejudicial statements respecting a prior conviction of defendant Hohensee, to his prejudice and to the prejudice of the corporate co-defendants. The question of pleading previous conviction in an indictment is governed generally by the rule that evidence of the commission of a wholly separate and independent crime even though of the same nature, is not admissible. Cf. *United States* v. *Modern Reed & Rattan Co.,* 159 F. 2d 656, and cases cited therein. Cf. *Commonwealth* v. *Ashe,* 146 Pa. Super. 482, 23 A. 2d 245.

The fact of the allegation in the indictment of a criminal record of defendant Hohensee, should have been sufficient grounds for the proper exercise of the Court's discretion to dismiss in the premises. Cf. *United States* v.

Haupt, 136 F. 2d 661, 672. That the sponsors of the prosecution, recognized the error of pleading a prior conviction in an indictment in a Federal Food and Drug case is suggested by their adoption of the proper method in a later prosecution for violation of the same Act, whereby the previous conviction was pleaded by an information separate and apart from the indictment. See *United States* v. *Stella D'Oro Biscuit Company,* 143 F. Supp. 275, wherein the cases relied on in this respect by the prosecution in the Court below, were distinguished with the opinion that such a practice of pleading a prior conviction in the indictment is prejudicial to the defendant.

The indictment as submitted to the jury, over defendants' objection, was altered by blocking out portions thereof, leaving the jury to speculate upon what was thus concealed and to draw the conclusion that the concealed portion reflected adversely upon the defendants. The indictment submitted was thus not the one returned by the grand jury (App. pp. 112, 169, 171; Tr. p. 1119).

It is well established that no authority exists to amend *any part of the body* of an indictment without reassembling the grand jury, and the doing of same is reversible error. *Carney* v. *United States,* 163 F. 2d 784 cert. denied 322 U.S. 824. In that case the alteration was made with the consent of counsel, as was the situation in *Dodge* v. *United States,* 285 F. 111, where words were stricken from the indictment as surplusage with the consent of counsel for both sides, the court holding that such action voided the indictment. See also *Ex Parte Bain,* 121 U. S. 1; *Steart* v. *United States,* 12 F. 2d 524.

In *Ex Parte Bain,* (supra,) this Court said:

> ". . . after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights

> of the citizen which was intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney."

The Court below erred in sustaining the validity of the indictment contrary to the principles of *Ex Parte Bain* (supra)—the trial court having first refused to dismiss the indictment because it pleaded the prior conviction of the individual defendant contrary to the principles of *United States* v. *Modern Reed and Rattan Co.*, 159 F. 2d 656, 658, and then later, sua sponte, altering the original by blocking out the offending allegations and submitting a photographic copy of the altered document to the jury.

CF: *Soper* v. *United States*, 220 F. 2d 158 (C. C. A. 9th 1955; cert. denied 350 U. S. 828 (wherein it was held that Court's instruction to jury to disregard the expression "M1" in indictment was not an amendment of the indictment *where nothing was erased or stricken from indictment*); *United States* v. *Dembowski*, 252 F. 894 (To amend an indictment is to correct or rectify or free from error; hence to cure a defect); and *United States* v. *Munday*, 211 F. 536: (There is no statutory authority for the amendment of an indictment returned by a Federal grand jury). See also *Edgerton* v. *United States*, 143 F. 2d 697, 699: (The only apparent qualification to the principle of *Ex Parte Bain* consistently accepted is that to vitiate an indictment the portion deleted must be from the body of the count").

Certainly as was said in *United States* v. *Norris*, 281 U. S. 619, 622: if "nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found" (citing *Ex Parte Bain* (supra)) then by analogy certainly nothing can be stricken from that indictment without such concurrence and as was held in that case even a defendant's consent does not affect the rule. As was said in *Ex Parte Bain* (supra) at pages 13, 14: "if it be once held that changes can be made by

the consent or the order of the Court in the body of the indictment as presented by the grand jury—the restriction which the Constitution places upon the power of the Court in regard to the prerequisite of an indictment, in reality no longer exists.—There was nothing before the Court on which it could . . . pronounce sentence."

5. The Element of Criminal Intent

The Court below further erred in its application of *Morisette* v. *United States,* 342 U. S. 246 (1952) to the facts in this case with respect to intent not being an element of the offenses charged, since defendant Hohensee was subject to felony penalties as a second offender under Section 333 of Title 21 USC and on conviction was sentenced to a felony term of one year and one day on each count, the sentence to run concurrently. This Honorable Court in *Morisette* while approving the conclusion reached in *United States* v. *Balint,* 258 U. S. 250 and *United States* v. *Berhman,* 258 U. S. 280 (also relied on by the Court below) and in adhering thereto for the circumstances to which the rule was then applied, stated that the *Balint* and *Berhman* offenses involved crimes dependent on no mental element but consisting only of forbidden acts or omissions. However, in referring to its 5 to 4 decision in *United States* v. *Dotterweich,* 320 U. S. 277, 280, 281, 284 this court stated in *Morisette* that it related the abandonment of the ingredient of intent with the peculiar nature and quality of the offense under "a now familiar type of legislation whereby penalties serve as effective means of regulation, warning that "hardship there doubtless may be under a statute which does penalize the transaction though consciousness of wrongdoing be totally wanting". In *Morisette* this Honorable Court throughout the opinion referred to the "non-intent public welfare offense" as commonly involving penalties which

are relatively small, where conviction does no grave damage to an offender's reputation, with the further observation that courts have thus construed such statutes with expressions of misgivings—citing Judge Cardoza's statement that such violations were punishable only by fine "moderate in amount" plus the cautious advice that in sustaining the power so to fine unintended violations, "We are not to be understood as sustaining to a like length the power to imprison. We leave that question open." *People ex rel.* v. *Sheffield Farms*, 225 N. Y. 25.

It should be noted that in the instant case, the prosecution, as hereinbefore pointed out (ante, p. 13) tried the case, not on the theory that the labeling on the products did not in themselves contain adequate directions for use, but on the theory that defendant Hohensee's subsequent oral statements were intended to recommend the products for purposes for which their labeling did not bear adequate directions for use. The Government actually tried the defendants on the obscure theory that defendant Hohensee had a scheme *"in his mind"* (App. 174)—i. e., he intended to violate the misbranding law by later talking to his classes about diseases and conditions of the body in connection with the subject of how to preserve and maintain a healthy body and mind through natural and drugless methods. But the Government neither alleged nor proved that at the time when the offense was alleged to have been committed (i. e., when the goods were offered for introduction into commerce) the defendant had any such intent. The prosecution's vague opinion as to what the defendant Hohensee had "in his mind" to do later, *at the time* the offense was alleged to have been committed, cannot be accepted as either an allegation or proof of a necessary element of an offense—particularly where there is no dispute about the fact that the goods, per se, did not *at that time* offend against the Federal Food, Drug and Cosmetic Act.

The instant case was not tried for the purpose of proving misbranding, as a means of enforcing certain regulatory requirements, but was admittedly tried by the Government for the purpose of punishing the individual defendant severely, and putting him out of business. See Appendix, pages 105, 106.

It thus is apparent that the prosecution has attempted in this case to do the very thing which this Honorable Court refused to do in the *Morisette* case, supra, when the Court stated (page 263):

> "The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries . . ."

The fact that the statute under which defendants were tried and convicted, makes a second offense punishable by a much heavier penalty, itself indicates that intent is part of the offense. Because, as stated by Judge Rives, in a specially concurring opinion in *Baker* v. *United States* (1956), 227 F. 2d 376, 378:

> "The usual purpose of evidence of prior convictions, when admissible at all, is to show that the acts proved to have been committed by the defendant were done with a criminal intent."

The Government having failed to allege and prove criminal intent, and the Trial Court having erroneously instructed the jury on this essential and vital point, the verdict of guilty returned by the jury against defendants, should be set aside.

6. The Unfair Trial Issue

Where in a long trial in a "weak" case, in which circumstantial evidence played the principal part, defendants failed to make formal objection to each and every objectionable statement and tactic of the prosecutor, but made known their opposing views by motion, objection or otherwise, made specific objections at the outset of a line of attack, which was overruled or ignored,—the antagonistic attitude and outspoken prejudice of the prosecutor should be examined as a whole even though there was no direct proof of record that the jury was influenced thereby, and the letter and spirit of Rules 2 and 52 of the Federal Rules of Criminal Procedure should be applied in determining whether the trial was a "fair" one.

The Court below in rejecting appellants' contentions that the attitude of the trial judge and the misconduct of the prosecutor, plus a patent disregard of evidentiary exhibits by the jury, deprived petitioners of their right to a fair trial—failed to apply the principles enunciated by this Honorable Court in *Berger* v. *United States,* 295 U. S. 78 and reiterated in *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 238-239, and further erred in grounding the rejection in part on failure of appellants to set out in the printed appendix examples of protested remarks of the prosecution (although cited to the official transcript); on failure to lodge formal objections, and a lack of evidence that the jury overheard a prejudicial side-bar remark of the trial court; and on the theory that the final remark of the prosecutor in his summation requesting "a fair and proper verdict" plus the instruction of the trial court that remarks of counsel and the court are not to be considered as evidence—disposes of appellants' assault on the government's summation—contrary to the principles laid down by this Court in *Kotteakos* v. *United States,* 328 U. S. 750 and

in *Krulewitch* v. *United States*, 336 U. S. 440, 444, 445,—that, if upon consideration of the record, the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict, the harmless error statute is not applicable,—with more particular emphasis on the concurring opinion of Mr. Justice Jackson in Krulewitch (p. 453) that "The naive assumption that prejudicial effects can be overcome by instructions to the jury—all practicing lawyers know to be unmitigated fiction."

"The question is, not whether any actual wrong resulted . . . under the circumstances related, but whether it created a condition from which prejudice might arise from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice." *Stone* v. *United States*, 113 F. 2d 70, 77, cited with approval in *Briggs* v. *United States*, 221 F. 2d 636, 638.

As this Court said in *In Re Murchison*, 349 U. S. 133:

> "Every procedure which would offer a possible temptation to the average man as a judge—not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law. *Tumey* v. *Ohio*, 283 U. S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice'. *Offutt v. United States*, 348 U. S. 11."

See also *Knapp* v. *Kinsey*, 232 F. 2d 458, 465, cert. denied 1 L.ed. 2d 86.

In *Roberson* v. *United States*, 237 F. 2d 536, 542 (CCA 5th 1956) it was said:

> "Before we can accord entire verity to a verdict of guilty, that verdict must result from a trial fairly

conducted in every material respect in accordance with the rules of law".

The Court of Appeals for the Fifth Circuit, in reversing the conviction, observed that inadvertently the trial was not so conducted and that a proper instruction under the circumstances came too late to cure the repeated errors.

In *Kotteakos* v. *United States,* 328 U. S. 750, 762, this Court said:

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. at 240-242. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole are material factors in judgment." See also *United States* v. *Meagley* 239 F. 2d. 637, 639.

At the arraignment before the Trial Court in the presence of the panel from whom the petit jury was ultimately drawn, there developed a colloquy between the Court and defendant Adolphus Hohensee which could only have created an unfavorable impression against this defendant, particularly when the Court remarked "I don't think you need a lawyer" (App. p. 54). The trial judge should be careful not to say anything which may have the effect of prejudicing the cause of the defendant before the jury. *United States* v. *Wheeler,* 219 F. 2d 773. At a sidebar conference the Court referred to this defendant as being "a terrible person" (App. p. 139). Whether this remark reached the ears of the jury is, of course, unknown, since defendant was not permitted to present evidence in this respect (App. p. 40), but it was indicated that the acoustics of the courtroom were

such as to permit voices to carry beyond the bench area (Tr. pp. 729, 730). Any remarks to the jury by trial judge or other officer of the court not relevant to any issue in the cause, which would have a tendency to coerce them in reaching their verdict, constitutes reversible error. *King* v. *State,* 89 S. E. 2d 585, 92 Ga. App. 616. Cf. *Peckham* v. *United States,* 210 F. 2d 693. See also *Zebroni* v. *United States,* 226 F. 2d 826.

The Court also repeatedly remarked about the cost involved (App. pp. 56, 105; Preliminary Tr. p. 32) and denied defendants' motions for a judgment of acquittal with the statement, "I could not think of granting the motion at this time after all the work that has been done, the tremendous amount of money expended on the case by the Government" (App. p. 170). The Court expressed the opinion that the case involved close legal questions (App. pp. 81, 87, 156, 170). The Court expressed further doubt as follows:

> "I think the act is very badly drawn, the worst act I ever had in my hands to try under, but it is not the fault of yourself or the Court but of Congress" (Tr. p. 1115).

A new trial is necessitated when an experienced trial judge indicates that while the case is confusing and difficult to understand yet since the prosecution has spent a substantial amount of time and money in preparation and presentation, it should be allowed to go to the jury. There is an implication that the jury in returning a verdict of guilty, had no better understanding. Cf. *United States* v. *Di Matteo,* 169 F. 2d 798.

The Court by requiring the defense to open the final argument to the jury (Tr. p. 1120), shifted the burden of proceeding from the Government to the defendants, and placed the defendants in the position of having to first describe and analyze the nature and extent of the Government's evidence, and then to point out the incon-

sistencies and failure thereof to prove the charges. Cf. *State* v. *Honig*, 78 Mo. 249, 255. The Government thus was enabled to acquire an advantage by perfunctorily denouncing defendants' reasoning on the evidence and to bring in irrelevant and prejudicial matters to which the defendants had no opportunity to reply or challenge, since the prosecution has the final say.

The prosecution (which was also represented by an attorney in the Food and Drug Administration) throughout the trial, either innocently or otherwise, engaged in tactics which cumulatively made it impossible for defendants to receive a fair and unbiased trial. The principal witness, employed by the Food and Drug Administration, showed interest and bias by arguing with the Court after a statement made by her had been ordered stricken (Tr. p. 542). She volunteered conclusions and beliefs (Tr. p. 576) (See also Tr. pp. 660; 665; 680). The prosecutor repeatedly volunteered statements indicating that *he* was going to give the defendants a fair trial (App. pp. 1158, 1173; Tr. pp. 644, 733), leaving the impression with the jury that the prosecutor controlled the proceedings and that the jury should look to him for advice and direction. The use of leading questions by the prosecutor on direct examination, to which objection was taken time after time (App. p. 123; Tr. pp. 34, 346, 347, 405, 406, 410, 482, 500, 536, 548, 549, 570, 573, 733, 743), resulted in witnesses merely parroting the prosecution's statements. In this connection, the Court failed to control such procedure, merely observing that the examiner should not ask leading questions (Tr. pp. 47, 346, 405, 410), without forcefully admonishing the examiner to abstain from such practices. At one point during cross-examination of a prosecution witness, the prosecutor out of order interrupted defendants' examination of a witness, to inject before the jury a statement relating to "quacks" in an exhibit in evidence (Tr. p. 881).

A highly prejudicial statement injected as part of the prosecutor's objection to a question asked on cross-examination of a Government witness (App. p. 61) was the subject of a motion for a mistrial by defendants (App. p. 62) which was denied. A motion for a mistrial was also made when the prosecutor unfairly commented on the probative effect of his witness's testimony (Tr. p. 417). The jury was admonished to disregard the remark (Tr. p. 418). At another point the prosecutor repeated several times for the apparent purpose of emphasizing to the jury his theory of the case, a statement in an exhibit "that food is medicine" (App. p. 99). At another point he propounded an improper and highly prejudicial question to a witness for the defense (Tr. p. 949) suggesting that defendant Hohensee was promoting some kind of devious scheme having to do with "atomic lots." He inferentially suggested that defendant Hohensee's students were dupes consisting of the halt and the lame (App. p. 99). He specifically interjected his own opinion on a medical subject by denouncing as untrue statements attributed to defendant Hohensee (App. p. 151). He accused the defense of trying to lead the prosecution down "devious paths" (Tr. p. 651) and that "They are playing fast and loose" (App. p. 152). No action was taken on defendants' motion for a mistrial. A highly prejudicial question asked of the accused's witness by the prosecutor, is improper unless the prosecution had evidence of or reasonable ground to believe the truth of its implication. *Lee Wong Sang* v. *United States,* 215 F. 2d 680. The intent of the prosecution to discredit and prejudice the defendant Hohensee and to obscure the only issue, is indicated by the prosecutor's remark to the Court "the whole picture strikes me as fraudulent" (Tr. p. 204), and the real intent and purpose of the prosecution is shown by the prosecution's statement to the Court: "We want to put him out of business" (App. pp. 105, 106).

In his closing argument to the jury the prosecutor made prejudicial and irrelevant remarks not based upon any valid evidence, to the effect as follows: that the case is an important one comparable to thefts of mail matter or embezzlement of money by a bank official; that in this case it is our health and our welfare that has been stolen away from us (App. p. 172); that the Better Business Bureau had stopped the defendant Hohensee from advertising (Tr. p. 1159); that defendant Hohensee was hiding behind the corporation (App. p. 172; Tr. p. 1162); that it was the obligation of the jury to accept direction as to their verdict from the Government who was protecting their lives and their health (App. p. 172); that defendants had devised a scheme whereby they think they can work within the law, profit therefrom, or violate the law while working within it (App. p. 172); that defendants were guilty of ingenious machinations (App. p. 172); that defendants were guilty of fraud because of the prices for the merchandise (App. p. 173); that the prosecutor was sure in his own mind that people bought the products for the curative effects (App. p. 173); that no one would think of eating this "stuff" as food (App. p. 173); by alluding repeatedly to his contention that defendants were guilty of a scheme (App. p. 173); and that it was up to the prosecutor and the jury as wise people to protect the foolhardy and the gullible and to see that our fellow citizens are adequately protected (App. p. 174).

The duty of prosecuting attorney is not to convict defendants but to try them fairly. Absolute fairness is a counsel of perfection. The prosecutor should hold himself to the highest practicable standard of fairness. Cf. *McFarland* v. *United States* 150 F. 2d 593, 594.

The jury patently disregarded the Court's instruction to examine carefully all of the evidence, in that it was physically impossible in the time during which they

deliberated, excluding the time out for luncheon at a neighboring hotel, for them to even have read a small portion of the approximately forty sizeable books and pamphlets which constituted a vital part of the evidence, and only a very minute portion of which had been read to them by counsel during the trial.

The jury was called upon to speculate upon the guilt or innocence of defendants, both by the tactics and remarks of the prosecutor, and by the instructions of the Court, in an atmosphere of contentiousness in which the defendant Hohensee was made to appear as an unsavory character and as everything but the president of a corporation which had shipped certain food products in interstate commerce and which were charged as being misbranded drugs because their labelling failed to bear adequate directions for use.

Petitioners' claim of unfairness is not based upon a single incident or remark, but upon the whole climate created by the prosecution. Denial of the motion for severance on the part of a corporate defendant (App. p. 19a) was an incident at the outset of a string of prejudicial incidents; CF: *United States* v. *Stein* 140 F. 761; the action on appellants' demand for a bill of particulars; the appearance of the sponsoring agency's attorney as a prosecutor, and his opening remarks, are others. Others are apparent of record, sufficient to support appellants' contention here, that if it were not for the overwhelming power prejudicially asserted by the prosecution, in such a "weak" case there could have been no verdict of guilty on the evidence or under the law. In other words, the conviction could only have come about through the pressure built up by the prosecution's methods of attack, both direct and subtle. CF: *United States* v. *Achelli* 234 F. 2d. 797, 801 cert. granted 1 L.ed. 2d. 595.

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238-239, this court pointed out: "Of course appellate courts 'in the public interest may, of their own motion,

notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings' " (citing *United States* v. *Atkinson* 297 U. S. 157, 160). The court further pointed out (p. 240) that: "Of course appeals to passion and prejudice may so poison the minds of jurors, even in a strong case that an accused may be deprived of a fair trial".

The better rationale appears in the court's reference to *Berger* v. *United States* 295 U. S. 78,—where the court distinguished and left undisturbed the principles of that case, which are still constantly referred to in more modern decisions. *Berger,* as the court later observed in *Socony-Vacuum Oil Co.* was a "weak" case, which seems to be an appropriate description of the instant case, when even the trial court was confused and uncertain and when all of the incidents of the proceeding from the faulty indictment to an erroneous charge, with all the antagonism of the prosecution and its witnesses is considered. The remarks of the prosecution seem to fit neatly into the description of the situation in Berger (p. 85):

> "The prosecuting attorney's argument to the jury was undignified and intemperate containing improper insinuations and assertions calculated to mislead the jury".

As was said in *Glasser* v. *United States* 315 U. S. 60, 67:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

CONCLUSION

In the light of the above and because of the nature of the instant case, and further because the two principal cases involving the Federal Food, Drug and Cosmetic Act, and relied on by the Court below, (*Kordel* v. *United States,* supra, and *United States* v. *Dotterweich,* supra,) were five to four decisions of this honorable court, it is respectfully urged that requisite number of members of the court consider the issues here presented to be of sufficient importance, to warrant the issuance of the writ.

Respectfully submitted:

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Washington, D. C.
Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,977

UNITED STATES OF AMERICA,
Appellee

v.

ADOLPHUS HOHENSEE, AN INDIVIDUAL,
Appellant

No. 11,978

UNITED STATES OF AMERICA,
Appellee

v.

EL RANCHO ADOLPHUS PRODUCTS, INC.,
A CORPORATION,
Appellant

No. 11,979

UNITED STATES OF AMERICA,
Appellee

v.

SCIENTIFIC LIVING, INC., A CORPORATION,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued November 16, 1956

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 29, 1957)

By MCLAUGHLIN, *Circuit Judge.*

Appellants were indicted on nine counts for causing the introduction and delivery for introduction into interstate commerce of misbranded drugs, contrary to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321 et seq.[1] Counts VIII and IX were withdrawn by the

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[1] 21 U.S.C. Chap. 9, Sub. Chap. II, Sec. 321 (g), (k), (m):
"For the purposes of this Chapter

* * * *

"(g) The term 'drug' means * * * (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

* * * *

"(k) The term 'label' means a display of written, printed, or graphic matter upon the immediate container of any article;

* * * *

"(m) The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."
21 U.S.C. Chap. 9, Sub. Chap. III, Sec. 331(a):
"The following acts and the causing thereof are hereby prohibited:
"The introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is * * * misbranded."
21 U.S.C. Chap. 9, Sub. Chap. III, Sec. 333(a):
"Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to or both such imprisonment and fine; but if the violation is committed after imprisonment for not more than one year, or a fine of not more than $1,000 a conviction of such person under this section has become final such person shall be subject to imprisonment for not more

government in the course of the trial and nolle prossed. All three appellants were convicted on the remaining seven counts.

The government's theory and proof involved two parallel sets of incidents. The individual appellant is president of one of the corporate appellants, Scientific Living, Inc. and the moving spirit in both. Counts I, II and III of the indictment concern Hohensee going to a food store in Phoenix, Arizona, advising the proprietor that he intended lecturing on health subjects in Phoenix shortly and seeking his cooperation. Appellant gave the storekeeper leaflets and advertising copy to be distributed and used for arousing interest in the lectures.[2] He provided

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than three years, or a fine of not more than $10,000, or both such imprisonment and fine."

21 U.S.C. Chap. 9, Sub. Chap. V, Sec. 352(f):

"A drug * * * shall be deemed to be misbranded—

* * * *

"Unless its labeling bears (1) adequate directions for use."

21 U.S.C. Chap. 9, Sub. Chap. VII, Sec. 371(a):

"The authority to promulgate regulations for the efficient enforcement of this Act, except as otherwise provided in this section, is hereby vested in the Secretary."

Regulations for the Enforcement of the Federal Food, Drug and Cosmetic Act.

Sec. 1.106, 21 CFR 1.106:

"Drugs and Devices: directions for use—

"(a) Adequate directions for use. 'Adequate directions for use' means directions under which the layman can use a drug or device safely and for the purposes for which it is intended. Directions for use may be inadequate because (among other reasons) of omission, in whole or in part, or incorrect specification of:

"(1) Statements of all conditions, purposes, or uses for which such drug or device is intended, including conditions, purposes, or uses for which it is prescribed, recommended, or suggested in its oral, written, printed, or graphic advertising * * *."

[2] The leaflets described the lectures as including "* * * hope-awakening new light on scores of specific conditions which today are the scourge of mankind. What does science say about Cancer? Diabetes? Rheumatism? Liver disorders? Chronic constipation?

for stocking El Rancho Adolphus brand products in the health food store. Demand for these products was to be created by the forthcoming lecture series.

Shipments of El Rancho Adolphus products began arriving at the Phoenix store in the latter part of January 1952 and were invoiced from one or the other of the corporate appellants at Scranton, Pennsylvania. The lectures were given by appellant at Phoenix from February 11 to March 6, 1952. At these lectures printed materials were distributed dealing with most chronic diseases and physical complaints, suggesting diets which included large quantities of El Rancho Adolphus products as remedies. According to the testimony, the oral representations of appellant at the lectures, regarding the subject matter of Count I, were astounding; peppermint tea, for example, was recommended for gall stones, colic, flatulence, headache, rheumatism, high blood pressure, arthritis, prostate trouble, lumbago, fits, convulsions, colitis, tuberculosis, asthma, pin worms and tape worms. The label on the El Rancho Adolphus brand peppermint tea leaves had only the following directions: "Used as a delicious refreshing table beverage. Take one level teaspoon of Adolphus peppermint for each cup of water, steep for four minutes. Do not boil. Sweeten to taste."

Counts II and III arise out of other products of the Phoenix promotion, namely, wheat germ oil and herb laxative. There were similar fantastic representations of their curative qualities.

Colitis? Stomach ulcers? Kidney stones? Kidney disease? Morning mouth? Tooth decay? Bleeding gums? Tuberculosis? Sinusitis? Asthma? Common Cold? Irritability? Vague pains? Scurvy? Rickets? Beri Beri? Glaucoma? Neuritis? Cataracts? Sexual Impotency? Frigidity in Women? Neurotic symptoms? Heart disease? High blood pressure? Low blood pressure? Rebuilding of blood? Anemia? Arteriosclerosis? Hemmorrhoids? Insomnia? Fatigue? Foot trouble? Better eyes without glasses? How to conquer premature old age? Better eyes without glasses! A startling revelation by a man who was actually blind! Today he enjoys perfect vision." The newspaper advertisements were similar in context.

Counts IV, V, VI and VII cover the campaign in Denver where Hohensee lectured during the months of July through September 1952. The preliminary arrangements for that city were made by one Miguarder, a government witness at the trial. The local retail outlet for the El Rancho Adolphus products was Leeds Health House, operated by Mrs. Ethel Barnes, who also testified for the government. El Rancho Adolphus brands of concentrated broth, whole wheat, peppermint tea leaves, and wheat germ called by the trade name, "Wheat Hearts", are the products alleged in those counts to have been misrepresented.

Appellants attack the constitutionality of 21 U.S.C. Section 352(f)(1) on the ground that the statutory language "Bears adequate directions for use" with reference to misbranding is too vague, indefinite and uncertain if construed to proscribe their activities. In Kordel v. United States, 335 U.S. 345 (1948) the Supreme Court upheld a conviction where the circumstances were very close to the case at bar. That decision definitely disposes of any question of constitutionality here.

In Kordel promotional materials were shipped separately for the products intended for use as drugs.[3] The Supreme Court reaffirmed its position as outlined in United States v. Dotterweich, 320 U.S. 277 (1943) and United States v. Sullivan, 332 U.S. 689 (1948) that this legislation be given a liberal interpretation to effectuate its high purpose of protecting unwary consumers in vital matters of health. The intended uses of the products in the present issue as in Kordel were to cure, ameliorate or prevent diseases. The evidence to prove their uses included both graphic materials distributed and testimony

[3] United States v. Cruez, 144 F. Supp. 229 (D.C.E.D. Ill. 1956) involves a conviction based solely on evidence of oral representations. Weeks v. United States, 245 U.S. 618 (1918), affirmed a food misbranding conviction based on oral representations.

or oral representations to users and prospective users. The latter are no less relevant on the question than the former. Both show that the products shipped were to be used as drugs. Alberty Food Products v. United States, 194 F.2d 463 (9 Cir. 1952). The crime is that the labels on the containers were insufficient for the purposes for which the products were to be used. The statute prohibits the shipment of any products that are to be used as drugs, and are inadequately labeled for that purpose.

Appellants challenge the sufficiency of the evidence to support the verdict. Their main thrust is against the time sequence of the various events in both Phoenix and Denver where the evidence of misbrandingt is primarily the oral representations and printed material distributed at the lectures. It is argued that since the lectures occurred some weeks after the products were introduced into interstate commerce, there was no proof of a medicinal or curative purpose or use of the products at the time of the shipments from Scranton to Phoenix and Denver. That problem was decided in Kordel, supra. There, the food products, including vitamins, minerals and herbs, were labeled innocuously as health foods. The advertising materials which proved the products were drugs for the amelioration of various ills were shipped separately both before and after the products.[4] The Supreme Court specifically held that:

> "The false and misleading literature in the present case was designed for use in the distribution and sale of the drug, and it was so used. The fact that it went in a different mail was wholly irrelevant whether we judge the transaction by purpose or result. And to say that the prior or subsequent shipment of the literature disproves that it 'is' misbranded when introduced into commerce within the meaning of

[4] The dissent points out "The evidence under one count was that the drugs were shipped July 10, 1942, while the booklets * * * were sent a year and half later, January 18, 1944."

§ 301 (a), is to overlook the integrated nature of the transactions established in this case.

"Moreover, the fact that some of the booklets carried a selling price is immaterial on the facts shown here. As stated by the Court of Appeals, the booklets and drugs were nonetheless interdependent; they were parts of an integrated distribution program. The Act cannot be circumvented by the easy device of a 'sale' of the advertising matter where the advertising performs the function of labeling."

Appellants further contend that false advertising is exclusively within the jurisdiction of the Federal Trade Commission. That argument was rejected in Kordel.

Hohensee insists the principle that intent is not an element of the offenses charged[5] should not have been applied to him since as a second offender, if convicted, he would be subject to felony penalties. His guilt falls into the felony category not because of evil intent but because of the maximum sentence of three years for second offenders provided by Section 333(a) of 21 U.S.C. The Act imposes criminal sanctions as a means of regulating activities so dangerous to the public welfare as not to permit of exception for good faith or ignorance. A person acts at his peril in this field. United States v. Dotterweich, supra. The instant facts are well within the rule established by United States v. Balint, 258 U.S. 250 (1922) which sustained a maximum sentence of five years under another no intent statute, the Narcotic Act of 1914, 38 Stat. 785. And see United States v. Behrman, 258 U.S. 280 (1922).

Hohensee had been convicted previously under the Federal Food, Drug and Cosmetic Act and that was pleaded in the indictment in order to call forth the second offender penalties under Section 303(a) of 21 U.S.C. Knowledge of the prior conviction was meticulously kept from the

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[5] See Morisette v. United States, 342 U.S. 246 (1952) for an exhaustive discussion of the principle.

jury and reference to it was blocked out of the copy of the indictment which went to the jury room. We find that no prejudice to the accused resulted from the procedure followed.

Appellants suggest they were seriously harmed when, a week prior to the start of the trial, in the presence of the jury panel, Hohensee, explaining that his attorney was ill, was arguing pro se for a bill of particulars and the judge commented "I don't think you need a lawyer." The record does not reveal any prejudicial connotation. Presumably it was an offhand complimentary pleasantry coupled with an indication that the court would protect his interests. In any event the transcript shows three of the defense attorneys in court at the time with two of them seemingly discussing the information desired.

Appellants also complain of a remark (lifted out of a sentence) the judge made at a sidebar conference during the trial. A Food and Drug inspector was on the witness stand. She testified she had attended three of Hohensee's Denver lectures. *Prior to any testimony of what Hohensee had said,* appellants, with the court's permission, objected to all such testimony as "incompetent, irrelevant and immaterial to prove the allegations of the indictment, and, furthermore, oral statements cannot constitute misbranding of an article." According to the transcript the court then stated at this sidebar colloquy with counsel, "If I uphold your objection we would dismiss this jury, but I cannot do it with all the preparation in this case. Why this man must be a terrible person; I do not know, but anyway I am not going to form any opinion at all. It is none of my business, so you just go ahead and I will overrule you."

On occasion, stream of thought language, wrenched away from its setting, may not seem too clear later but that difficulty is not present in the above quoted statement. Manifestly the judge, feeling that the first part

of his off-hand observation did not properly express his state of mind, remedied it immediately and in the same sentence. No motion was made at the time or thereafter concerning it. The only purpose of counsel coming to the side of the bench was to prevent the jury overhearing the motion. There is no evidence that purpose failed.

A third objection is voiced to the court's expressions with reference to the cost of the trial. In denying the motions for acquittal, the court did allude to the large trial expense but in its next sentence and the same paragraph stated "If I determine that I am in error about this (the denial of the motions) at any time I shall gladly grant a new trial, or even enter a judgment of acquittal, if I think I should * * *." Of the two other allusions to trial cost in appellants' appendix, one has to do with the court trying to narrow the trial scope. In the other, the court, at considerable length, rejected the government's plea not to postpone the trial at the defense request. The government urged it had expended large sums of money in preparation. The court concluded its decision to allow the continuance by saying:

> "Now, this all means that the preservation of freedom is very expensive, just like everything else, more so every day, and it always has been. So I am not going to sustain the objections to the motion because of the expense, and I will grant the motion for a continuance, and I will fix November 29, 1954 at 2 o'clock in the afternoon for the trial of this case."

Appellants assert the district attorney prevented a fair trial to them by asking leading questions. The one illustration of these in appellants' appendix shows their objection to the particular question was sustained without argument. As to several remarks of the district attorney, now protested, appellants have not bothered to set out the record of these in their appendix. Those that are shown do not evidence substantial harm, individually or collectively.

Appellants before us assail the government summation but made no objection to it during its progress or after it had been concluded; examining it we do not find that it substantially exceeded fair inferences from the evidence. Its final note stressed that the government's concern was "* * * *with the misbranding of these drugs and we want them properly labeled.*" (Emphasis supplied). As he finished his summation government counsel said to the jury, "All I ask you is that you render a fair and proper verdict in this case * * *." In the thorough and scrupulously fair charge, among many other things, the court said:

> "In considering the evidence before you your attention is directed to the fact that not all matters coming to your attention in this trial can be considered by you as evidence. The indictment, the opening remarks of counsel, the arguments of counsel, the remarks of counsel, and the remarks of the Court during the trial of the case are not evidence and are not to be considered by you as such in determining the facts of the case."

We have examined all other points of appellants. They do not raise substantial questions and need not be discussed at length.

The judgments of the district court will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,977

UNITED STATES OF AMERICA,
Appellee

v.

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EL RANCHO ADOLPHUS PRODUCTS, INC.,
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No. 11,979

UNITED STATES OF AMERICA,
Appellee

v.

SCIENTIFIC LIVING, INC., A CORPORATION,
Appellant

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge,* and MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed March 1, 1957

PER CURIAM:

The petition for rehearing contains nothing of merit which has not been heretofore presented to and considered by this court.

There is a copy of an affidavit, executed February 11, 1957, annexed to the petition. It is submitted by appellants as an example of other affidavits which they state they are prepared to produce. It characterizes language, tone, range of voice and manner of the trial judge on two occasions; the first, during a pre trial motion and the second, during the course of the trial. Both those incidents were argued fully and disposed of specifically by our opinion in the case. The material offered was never before the trial court. It is entirely outside the record. In those circumstances the deliberate attempt to bring it before this court is inexcuable.

The petition for rehearing will be denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

ANALYSIS OF EVIDENCE AS TO DATES

Count	I	II	III	IV	V	VI	VII
Article	Peppermint Tea	Wheat Oil	Herb Laxative	Broth	Whole Wheat	Peppermint Tea	Wheat Hearts
Gov't Exhibit #	21	22	23	43	45	47	48
Date alleged as to commission of offense	1/21/52 to 1/25/52	2/6/52 to 2/13/52	1/21/52 to 2/27/52	7/22/52 to 7/29/52	7/22/52 to 8/5/52	7/29/52 to 8/5/52	8/14/52
Date of shipment	1/21/52 1/25/52	2/6/52 2/13/52	1/21/52	7/29/52 7/22/52	7/22/52	8/5/52	8/5/52 8/14/52
As shown by Gov't Exhibit #	16, 17	18, 19	16	60, 61	61	62	59, 63
First mentioned in lecture of:	2/21/52 (App. 90)	2/26/52 (App. 95)	2/19/52 (App. 97, 98)	8/28/52 (App. 140)	7/31/52 (Tr. 557)	8/14/52 (App. 140)	8/28/52 (App. 140)
Date acquired by Inspector	3/1/52	3/1/52	3/1/52	9/3/52	9/3/52	9/3/52	9/3/52